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No. 02-1505

Supreme Court, U.S.
FILED
MAY 28 '03
OFFICE OF THE CLERK

**IN THE SUPREME COURT OF THE UNITED STATES**

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THOMAS L. CAREY, *Petitioner,*

**v.**

TONY EUGENE SAFFOLD, *Respondent.*

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ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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# PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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**IN THE SUPREME COURT OF THE UNITED STATES**

No. 02-1505

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THOMAS L. CAREY, *Petitioner,*

**v.**

TONY EUGENE SAFFOLD, *Respondent.*

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## ARGUMENT

### CERTIORARI SHOULD BE GRANTED TO REVERSE THE NINTH CIRCUIT'S MISREADING OF *CAREY v. SAFFOLD* AND TO RESOLVE THE CIRCUIT CONFLICT CREATED BY THE NINTH CIRCUIT'S INDEFINITE TOLLING RULE

In his Brief in Opposition, Respondent asserts that the Ninth Circuit's opinion "comports with this Court's decision" in *Carey v. Saffold*, 536 U.S. 214 (2002), "does not conflict with the decision of any other court of appeals" and sets forth a "fact-based ruling [that] does not warrant further review by this Court." Opp. at 7. Respondent also asserts that "it would not be contrary to [*Carey v.*] *Saffold* for federal courts to deem a delay 'unreasonable' only if the California courts say it is." Opp. at 11, n.5. Respondent's assertions are wrong. The Ninth Circuit's indefinite tolling rule denigrates California's time

limitation for filing original habeas petitions and disregards the standards by which California courts determine whether such petitions are timely filed. The Ninth Circuit's rule does so by incorrectly assuming that original petitions filed after delays of 7 months, 9 months, 15 months, and 18 months were all timely filed. This Court should grant certiorari and reverse the Ninth Circuit's indefinite tolling rule because it instructs federal courts to find original state habeas petitions timely filed for AEDPA tolling purposes despite delays of many months or years when state courts rule on the merits and fail to impose procedural bars for untimeliness. The Ninth Circuit's approach is fundamentally flawed and in conflict with Congressional intent and the reasoning of this Court and other courts of appeals because of its exclusive focus on whether or not the state court has imposed a procedural bar for untimeliness.

As recognized by this Court in *Carey v. Saffold* and by the five courts of appeals in conflict with the Ninth Circuit, the critical issue is whether the prisoner has *timely filed* his state petition under state law, thereby qualifying for tolling under 28 U.S.C. § 2244(d)(2). Although the imposition of a procedural bar for untimeliness clearly pertaining to the delayed petition in question "would be the end of the matter," App. 26a (536 U.S. at 226), the fact that a procedural bar has not been imposed does not mean that a particular state petition has been timely filed. Under *Carey v. Saffold*'s interpretation of AEDPA's tolling provision, 28 U.S.C. § 2244(d)(2), federal courts must apply state law to the facts of a particular case in order to determine whether the state petition has been timely filed. This Court should grant certiorari, reverse the court of appeals and hold (as the Ninth Circuit initially did on remand, *see* App. 40a-41a; 295 F.3d 1024; *also see Roberson v. Hubbard*, 2002 WL 1808689 (9th Cir. 2002) (unreported)) that AEDPA tolling issues concerning the timely filing of original petitions in California be resolved by applying *In re Harris*, 5 Cal.4th 813, 828 n.7, 855 P.2d 391, 398 n.7 (1993) to the facts of cases raising such issues.

Under California law, the general rule regarding timeliness is that "the habeas corpus petition must be filed within a reasonable time after the petitioner or counsel knew, or with due diligence should have known, the facts underlying the claim as well as the legal basis of the claim." *In re Harris*, 5 Cal.4th at 828, n.7. In *In re Robbins*, 18 Cal.4th 770, 778 (1998), the California Supreme Court stated that because of "the important public interest in the finality of judgments . . . a variety of procedural rules have been recognized that govern the proper use of the writ of habeas corpus, including a requirement that claims raised in a habeas corpus petition must be *timely filed*." Italics added.

A petition for habeas corpus "*should be filed as promptly as the circumstances of the case allow*." *In re Stankewitz*, 40 Cal.3d 391, 397, n.1 (1985), italics added; *In re Clark*, 5 Cal.4th 750, 765, n.5 (1993); *In re Sanders*, 21 Cal.4th 697, 704 (1999). "Substantial delay is measured from the time the petitioner or his or her counsel knew, or reasonably should have known, of the information offered in support of the claim and the legal basis for the claim." *In re Robbins*, 18 Cal.4th at 780 and 787; *In re Sanders*, 21 Cal.4th at 704. The "petitioner bears the burden of *establishing*, through his or her specific allegations, which may be supported by any relevant exhibits, the absence of substantial delay." *In re Robbins*, 18 Cal.4th at 780, italics in original; *In re Bower*, 38 Cal.3d 865, 872 (1985). If he fails to meet this burden, "he has not established the absence of substantial delay" as to his claim. *In re Robbins*, 18 Cal.4th at 805. In short, he has not timely filed his petition under California law.

It is important to recognize the distinction between the determination of whether a petition has been *timely filed* (employing the general rule of timeliness to determine if a petition has been filed without substantial delay) and the separate determination of whether or not a state court will *impose the bar of untimeliness*. As explained in *In re Robbins*, "to avoid the **bar of untimeliness** . . . the *petitioner* has the

burden of establishing (i) absence of substantial delay, (ii) good cause for the delay, or (iii) that the claim falls within an exception to the bar of untimeliness." 18 Cal.4th at 780, 784, italics in original, emphasis added; *In re Gallego*, 18 Cal.4th 825, 831 (1998); *In re Sanders*, 21 Cal.4th at 704. The *Robbins* court noted that when it imposes the *procedural bar of untimeliness* "this signifies that we . . . have determined that the petitioner has failed to establish the absence of substantial delay or good cause for delay, *and* that none of the four exceptions set out in *Clark, supra*, 5 Cal.4th 750, 798-99, apply." 18 Cal.4th at 815, n. 34, italics in original.

Given the distinction under California law between the determination of whether a petition has been *timely filed* and the separate determination of whether or not a state court will *impose the bar of untimeliness*, there is nothing inconsistent with a state court's decision to rule on an original habeas petition solely on its merits and that petition still being untimely filed under state law such that it does not toll the federal one-year limitations period. In this sense, "California's collateral review process functions very much like that of other States, but for the fact that its timeliness rule is indeterminate." App. 22a (536 U.S. at 222). Just as in other states, where courts may choose to ignore the fact that a petition has been untimely filed and rule on the merits, *see Moore v. Crosby*, 321 F.3d 1377, 1380-1381 (11th Cir. 2003); *Allen v. Mitchell*, 276 F.3d 183, 186-187 (4th Cir. 2001); *Melancon v. Kaylo*, 259 F.3d 401, 407 (5th Cir. 2001); *Gibson v. Klinger*, 232 F.3d 799, 804-806 (10th Cir. 2000); *Fernandez v. Sternes*, 227 F.3d 977, 980-981 (7th Cir. 2000), California courts often ignore the clear fact that a petition has not been timely filed and rule solely on the merits, most commonly when the petitioner has failed to state a prima facie case for relief. The Ninth Circuit's failure to recognize this basic principle has placed it in conflict with the decisions of the Fourth, Fifth, Seventh, Tenth, and Eleventh Circuits and the reasoning of *Carey v. Saffold*, where this Court recognized that one of the many reasons a state court might "address the merits

of a claim that it believes was presented in an untimely way" is "where the merits present no difficult issue" and also recognized that a merits decision by the California Supreme Court cannot by itself "indicate that the petition was timely." App. 25a-26a (536 U.S. at 225-226).

In light of the requirement that original state habeas corpus petitions must be "filed as promptly as the circumstances of the case allow" in order to be timely filed under California law, the Ninth Circuit's indefinite tolling rule is without doubt incorrect because it grants tolling under AEDPA's tolling provision despite delays of many months or years, thereby risking "the tolling of the federal limitations period even when it is highly likely that the prisoner failed to seek timely review in the state appellate courts." App. 26a (536 U.S. at 226). Certainly, the reasonable time required to make a copy of the claims denied by the lower state court and to file an "appeal" by handing it to prison authorities for filing in the higher court cannot be as long as 4 months, 7 months, 9 months, 15 months, 18 months, 4 years, or longer. By citing *Welch v. Newland*, 267 F.3d 1013 (9th Cir. 2001), a case where the state court failed to impose a procedural bar and instead employed the identical summary denial on the merits as the cases relied on by the Ninth Circuit in establishing its indefinite tolling rule, this Court demonstrated its concern that such an indefinite tolling rule "threatens to undermine the statutory purpose of encouraging prompt filings in federal court in order to protect the federal system from being forced to hear stale claims." App. 26a (536 U.S. at 226).

This Court's concern was well founded because "California courts routinely deny petitions filed after lengthy delays without making specific findings of undue delay." App. 37a (536 U.S. at 235 (Kennedy, J., dissenting)). The reason for this is that, when prisoners fail to state a prima facie case for relief, "[s]ummary disposition" of the habeas corpus petition "is the rule." *In re Clark*, 5 Cal.4th at 781. The State typically does not have the opportunity to argue for the imposition of a

procedural bar for untimeliness concerning most state non-capital original habeas corpus petitions because those petitions are decided by California courts without requesting a response from the State due to the prisoner's failure to state a prima facie case for relief. Consequently, the majority of California Supreme Court habeas corpus decisions on any given day and the majority of the thousands of petitions decided each year are likely to be summary denials on the merits without citation or comment (such as the summary denial in *Welch* and the summary denials relied upon by the Ninth Circuit to establish the indefinite tolling rule in this case).

Nor is there any basis to Respondent's assertion that the court of appeals decision in the instant case is a "fact-based ruling [that] does not warrant further review by this Court." To the contrary, the Ninth Circuit's decision is precisely the type of decision that merits review: it created a broad rule that will have applications in hundreds, if not thousands, of other cases. To be sure, analysis of that rule will take place on the crucible of the particular facts of this case; but that is a commonplace in our system of jurisprudence. The broad legal question is whether an order by the California Supreme Court denying a habeas petition on its merits — such as a summary, one word, denial — constitutes a holding by that court that the petition was timely filed, which would mean that the AEDPA limitations period was tolled during the pendency of that petition. This Court should grant certiorari and confirm that the answer is no; whether a state habeas petition is timely filed is guided by application of California law as set forth *In re Harris*, *In re Robbins*, and *In re Clark*. *See*, *supra*, at 3-4.

Once the Court has answered the broad legal question, the remaining issue would be application of the correct standard, *i.e.*, whether or not the length of Respondent's delay in filing his petition constituted substantial delay under California law, thereby causing his petition to be untimely filed.[1] It would be

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1. As discussed, *supra*, at 3-4, under California law, whether an

in this Court's discretion whether to address that issue itself, remand the case to the Ninth Circuit for application of the correct standard, or certify the question to the California Supreme Court. As to the latter option, application of a legal standard is a legal question that is perfectly suited for certification under California law. *See also* Pet. 20-22 (explaining why certification of the issue would be proper).

The Ninth Circuit's ruling was not fact-based, but instead established a broad rule that will affect thousands of federal habeas petitions each year. The Ninth Circuit's indefinite tolling rule is already undermining Congress's intent to expedite the federal habeas process. In the short time since the court of appeals issued its decision, other panels of the Ninth Circuit have vacated numerous district court decisions that had found delays of more than, or almost, an entire year to be untimely. *See, e.g., Boscaino v. Roe*, 2003 WL 1473575 (9th Cir. 2003) (unreported) (13-month delay); *Young v. Terhune*, 2003 WL 136100 (9th Cir. 2003) (unreported) (13-month delay); *Moran v. Clark*, 2003 WL 133092 (9th Cir. 2003) (unreported) (10½-month delay); *Wilson v. Hickman*, 2003 WL 264747 (9th Cir. 2003) (unreported) (8-month delay); *McDonald v. Castro*, 2003 WL 1878804 (9th Cir. 2003) (unreported) (8-month

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original habeas petition is timely filed depends strictly on the length of the delay in filing. Any excuses proffered by a petitioner for the delay would go only to the question whether the California courts should impose a procedural bar based on untimeliness. But, as noted, the AEDPA tolling provision is only concerned with untimeliness, not with whether a procedural bar is imposed. Hence, any factual issues relating to a petitioner's excuses for his delay would be irrelevant to the statutory tolling issue. Their only relevance would be to whether they justify tolling the AEDPA limitations period under the doctrine of equitable tolling. In this regard, it should be noted that the Ninth Circuit opinion failed even to address the factual question concerning notice to Saffold. Furthermore, although Saffold's equitable tolling argument (based upon his alleged failure to receive notice of the denial of his petition) has never been decided by a panel of the Ninth Circuit, it has previously been rejected both by the district court and by Judge O'Scannlain. App. 63a-64a and 92a.

delay). Furthermore, under the Ninth Circuit's indefinite tolling rule, federal district courts in California must now grant statutory tolling in cases involving substantial delays of at least 18 months and probably longer periods such as the 4-year delay in *Welch*, so long as the state court follows the common practice in California of issuing a summary denial on the merits without imposing a procedural bar for untimeliness by citation or comment. Surely Congress did not intend to promote statutory tolling in a case such as *Welch* involving an unexplained delay of well over four years merely because the state court did not impose a procedural bar for untimeliness and on the other hand intend to deny statutory tolling in a case such as *Freeman v. Ramirez*, 2002 WL 31236171 (9th Cir. 2002) (unreported) (finding a 4-year delay unreasonable where the California Supreme Court's summary denial order imposed a procedural bar for untimeliness by citing *In re Robbins*).

Respondent cites *Peterson v. Hickman*, 2002 WL 1578933 at *2 (N.D. Cal. July 15, 2002) (denying tolling after finding 7-year delay "unreasonable on its face") and *Bennett v. Mueller*, 322 F.3d 573, 579-580 (9th Cir. 2003) in support of his argument that "[t]he court of appeals did not issue a broad ruling that federal courts *always* must conclude that a state habeas petition was timely filed absent an express state court ruling on the subject." Opp. at 8-10, italics in original. Although Judge Breyer's decision in *Peterson* was a correct interpretation of *Carey v. Saffold* and California law, *Peterson* was decided immediately after the Ninth Circuit's initial (correctly decided) order on remand and prior to the Ninth Circuit's opinion setting forth its indefinite tolling rule. Consequently, it is not certain that the *Peterson* decision would be upheld if appealed to the Ninth Circuit under its current rule. Undoubtedly, defense counsel in *Peterson* would make the same argument Respondent has made here, that his client is entitled to tolling because the state court failed to impose a procedural bar for untimeliness. Furthermore, although the Ninth Circuit concluded in *Bennett* that a 6-year delay qualifies as substantial

delay under California law, the California Supreme Court in that case had imposed a procedural bar for untimeliness by denying the petition "on the merits and for lack of diligence" and the *Bennett* case was concerned with the issue of procedural default rather than tolling under AEDPA's statute of limitations. Consequently, there is no guarantee that the Ninth Circuit will not extend tolling to cases well beyond the specified 18-month delay, to delays of four years as in *Welch* or possibly even longer delays if the state court fails to impose a specific procedural bar for untimeliness.

Respondent also incorrectly asserts that "the issue of law presented here is almost entirely unique to California." Opp. at 8. As discussed in the Petition at page 18, note 3, the Sixth Circuit has granted tolling based upon reasoning consistent with the Ninth Circuit's indefinite tolling rule, and the rule is in conflict with the decisions of five other courts of appeals. Pet. at 14-19.

Citing this Court's statement that "the State, through its Supreme Court decisions or legislation, can explicate timing requirements more precisely should that prove necessary," App. 23a (536 U.S. at 223), Respondent argues that "[i]f the Ninth Circuit's approach is indeed problematic, therefore, the State can readily help itself without further involvement by this Court." Opp. at 8. To the contrary, even if such a specific timeliness rule were set forth either by rule or case law, this would not solve the problem presented by the Ninth Circuit's indefinite tolling rule. Unduly delayed petitions would still be found timely under the rule because the majority of California original habeas corpus petitions are decided by means of summary dispositions on the merits without comment or citation and would be deemed timely by the Ninth Circuit due to the failure of the state court to impose a specific procedural bar for untimeliness.

The Seventh Circuit severely criticized the "Cheshire-cat like quality" of the Ninth Circuit's first indefinite tolling rule, stating that it preferred "reality" over the Ninth Circuit's "make-

believe approach, under which petitions were *continuously* pending whenever a state court allows an untimely filing." *Fernandez v. Sterns*, 227 F.3d at 980-981, italics in original. Although this Court vacated the Ninth Circuit's first indefinite tolling rule in *Carey v. Saffold*, the instant case demonstrates that the "Cheshire-cat like quality" of the first rule remains alive in the instant court of appeals opinion, thereby undermining the intent of Congress and this Court's reasoning in *Carey v. Saffold* and perpetuating the conflict with the Seventh Circuit as well as the conflict with the Fourth, Fifth, Tenth and Eleventh Circuits.

For the foregoing reasons and for the reasons set forth in the petition for writ of certiorari, the petition for writ of certiorari should be granted.

Dated: May 27, 2003

Respectfully submitted,

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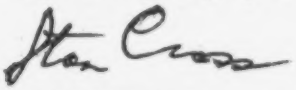

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